

(4) Projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions; and

(5) Projects where the pilings are intended to be used for structural support of a building such as a commercial or residential structure.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Added new (c) regarding those activities not considered as resulting in alteration of the character of freshwater.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Former N.J.A.C. 7:7A-2.2, Subchapters which apply to freshwater wetlands permits or open water fill permits, was repealed.

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (a)5, inserted "and" at the end; in (a)6, substituted a period for "and" at the end; and deleted (a)7.

Case Notes

N.J.S.A. 13:9B-9(a)(2) of the New Jersey Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to 13:9B-30, requires an applicant for a wetlands permit who proposes to mitigate the adverse impact upon wetlands of a development project on its property at an off-site location to give notice to owners of property within 200 feet of the mitigation site. *Rinaldo v. RLR Inv.*, 387 N.J. Super. 387, 904 A.2d 725, 2006 N.J. Super. LEXIS 238 (App.Div. 2006).

INVALIDITY ANNOTATION: Validity of N.J.A.C. 7:7A-2.2(a)7 affected. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478, 852 A.2d 1083 (2004).

Initial Decision (2006 N.J. AGEN LEXIS 176) adopted, which concluded that where respondent knowingly engaged in the unauthorized ditching and disruption of wetlands, a penalty of \$6,000 was warranted since the wetlands were of intermediate resource value (two points), the total disturbance was under an acre (one point), and the violation was intentional (three points). *N.J. Dep't of Env'tl. Prot. v. Wagner*, OAL Dkt. No. ESA 04815-04, 2006 N.J. AGEN LEXIS 579, Final Decision (April 21, 2006).

7:7A-2.3 Identifying freshwater wetlands

(a) Freshwater wetlands shall be identified and delineated using the three-parameter approach (that is, hydrology, soils and vegetation) enumerated in the 1989 Federal Manual, as defined at N.J.A.C. 7:7A-1.4.

(b) To aid in determining the presence or absence of freshwater wetlands, the Department may refer to any of the following sources of information:

1. New Jersey Freshwater Wetlands maps prepared by the Department and available as indicated in (f) below;
2. United States Department of Agriculture Soil Surveys;
3. USGS quad maps;
 - i. NWI maps shall be used to indicate the approximate location of some freshwater wetlands;
 - ii. NWI maps have been determined to be unreliable for the purposes of locating the actual wetlands boundary;

4. United States Geologic Survey topographic maps;
5. Letters submitted by applicants containing site specific data;
6. Comments filed by municipal and county governments and interested citizens; and
7. Comments filed by State or Federal agencies.

(c) Vegetative species classified as hydrophytes and indicative of freshwater wetlands shall include, but not be limited to, those plants listed in "National List of Plant Species that Occur in Wetlands: 1988 New Jersey," compiled by the United States Fish and Wildlife Service in cooperation with the ACOE, USEPA, and the United States Soil Conservation Service, and any subsequent amendments thereto.

(d) To obtain a determination from the Department of the presence, absence, or boundaries of freshwater wetlands on a particular site, a person may apply to the Department for a letter of interpretation under N.J.A.C. 7:7A-3.

(e) The Department has developed freshwater wetlands maps at a scale of 1:12000 to provide guidance and for general informational purposes. These freshwater wetlands maps can help to determine the approximate extent and location of wetlands. However, these maps are for guidance only and do not take the place of nor supersede a wetland delineation that the Department has approved through a letter of interpretation issued for a particular site.

(f) The Department has provided the New Jersey freshwater wetlands maps to the following offices for public inspection:

1. The county clerk or registrar of deeds and mortgages in each county;
2. The municipal clerk of each municipality; and
3. The Department's Maps and Publications Sales Office, located at the address listed in N.J.A.C. 7:7A-1.3.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

Added new (c)1. and recodified existing 1.-6. as 2.-7.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Case Notes

Engaging in regulated activities in freshwater wetlands and transition area without permit warranted imposition of civil penalty. *Department of Environmental Protection v. Ludlam*, 95 N.J.A.R.2d (EPE) 233.

Nursery required to seek permit to fill in intermittent stream; designated as priority wetlands. *Brookside Nursery v. DEPE*, 94 N.J.A.R.2d (EPE) 106.

7:7A-2.4 Classification of freshwater wetlands by resource value

(a) Freshwater wetlands shall be divided into three classifications based on resource value. The Department shall consider the resource value classification of a wetland in, among

other things, evaluating alternatives to the proposed regulated activity, in determining the size of the transition area, and in determining the amount and/or type of mitigation required.

(b) A freshwater wetland of exceptional resource value, or exceptional resource value wetland, is a freshwater wetland which:

1. Discharges into FW-1 or FW-2 trout production waters or their tributaries;
2. Is a present habitat for threatened or endangered species; or
3. Is a documented habitat for threatened or endangered species, and which remains suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat.

(c) The Department identifies present or documented habitat for threatened or endangered species for purposes of (b) above using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened or endangered wildlife species. The details of this method are described in the Division of Land Use Regulation freshwater wetlands technical manual, available from the Department's Office of Maps and Publications at the address in N.J.A.C. 7:7A-1.3. An applicant may request that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value. Such a request shall include a demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity. Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.

(d) A freshwater wetland of ordinary resource value, or an ordinary resource value wetland, is a freshwater wetland which does not exhibit any of the characteristics in (b) above, and which is:

1. An isolated wetland, as defined at N.J.A.C. 7:7A-1.4, which:
 - i. Is smaller than 5,000 square feet; and
 - ii. Has the uses listed below covering more than 50 percent of the area within 50 feet of the wetland boundary. In calculating the area covered by a use, the Department will only consider a use that was legally existing in that location prior to July 1, 1988, or was permitted under this chapter since that date:
 - (1) Lawns;
 - (2) Maintained landscaping;
 - (3) Impervious surfaces;
 - (4) Active railroad rights-of-way; and

(5) Gravelled or stoned parking/storage areas and roads;

2. A drainage ditch;
3. A swale; or
4. A detention facility created by humans in an area that was upland at the time the facility was created regardless of the wetland resource classification of the wetland under this chapter, or the classification of the body of water, as FW-1 or FW-2 trout production, to which it discharges.

(e) A freshwater wetland of intermediate resource value, or intermediate resource value wetland, is any freshwater wetland not defined as exceptional or ordinary.

(f) The classification system established under this section shall not restrict the Department's authority to require the creation or restoration of freshwater wetlands under N.J.A.C. 7:7A.

(g) To obtain a Department determination of the resource value classification for a particular wetland, an applicant may obtain a letter of interpretation from the Department under N.J.A.C. 7:7A-3.

Amended by R.1989 d.362, effective July 3, 1989.

See: 21 N.J.R. 596(a), 21 N.J.R. 1858(a).

In (b)2: Deleted language to clarify definition of "documented habitat for endangered or threatened species" for use in classifying freshwater wetlands.

Amended by R.1992 d.117, effective March 16, 1992.

See: 23 N.J.R. 338(a), 24 N.J.R. 975(b).

New (c)i., i-iii added defining for this subsection "isolated wetlands" and "development" and requiring investigation of area within 50 ft. of wetland boundary.

Amended by R.2001 d.312, effective September 4, 2001.

See: 32 N.J.R. 2693(a), 33 N.J.R. 3045(a).

Amended by R.2002 d.234, effective July 15, 2002.

See: 34 N.J.R. 390(a), 34 N.J.R. 2436(b).

Rewrote (c).

Public Notice: Notice of Revision and Updating of Freshwater Wetlands Technical Manual to Incorporate Version 2.0 of the Landscape Maps.

See: 36 N.J.R. 1129(a).

Public Notice: Notice of Revision and Updating of the Landscape Maps.

See: 40 N.J.R. 2572(b).

Amended by R.2008 d.291, effective October 6, 2008.

See: 39 N.J.R. 3587(a), 40 N.J.R. 5581(a).

In (c), substituted "Division of Land Use Regulation" for "Land Use Regulation Program's"; and in (d)4, inserted "regardless of the wetland resource classification of the wetland under this chapter, or the classification of the body of water, as FW-1 or FW-2 trout production, to which it discharges".

Case Notes

Department of Environmental Protection could adopt landscape method to classify those wetlands which support the habitats of threatened or endangered species, even if the species had not been seen in that particular area; Freshwater Wetlands Protection Act did not limit identification of wetlands of exceptional value to habitats which had a sighted or documented presence of an endangered or threatened species, evidence supported idea that species were not stationary and needed large contiguous blocks of habitat to survive, and landscape method helped implement that idea. In the Matter of Adopted Amendments to N.J.A.C. 7:7A-2.4, 365 N.J.Super 255, 839 A.2d 60.

Projects that received preliminary approval prior to July 1, 1989 were exempt from compliance with transition-area provisions of Freshwater Wetlands Protection Act. Appeal of Adoption of N.J.A.C. 7:7A-1.4 (Definition of "Documented Habitats for Threatened and Endangered Species" and "Swale"), 7:7A-2.5(b)(2), and 7:7A-2.7(f), 118 N.J. 552, 573 A.2d 143 (1990).

Property owner's argument that a drainage easement existed on the property and that, accordingly, the corresponding wetlands were wetlands of "ordinary resource value" and thus not subject to transition area requirements, was rejected since a drainage easement does not equate to a manmade drainage ditch and the purported fact that drainage patterns corresponded with the mapped drainage easements did not establish the presence of a manmade drainage ditch. *Cummings v. N.J. Dep't of Env'tl. Prot., Land Use Regulation Program*, OAL Dkt. No. ESA 4466-06, 2007 N.J. AGEN LEXIS 920, Final Decision (July 2, 2007).

Department of Environmental Protection has statutory authority to classify wetlands as exceptional resource value based on the presence of threatened species habitat; the Department's authorization under the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., is not limited to identifying only endangered species. *ZRB, LLC v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 6180-04, 2007 N.J. AGEN LEXIS 921, Final Decision (July 2, 2007).

General Permit No. 6 was properly denied under N.J.A.C. 7:7A-4.3(b) where the human disturbance caused by the proposed subdivision would adversely impact the adjacent present habitat of the barred owl, a threatened species, and because petitioner had not carried its burden by the preponderance of the evidence that its freshwater wetlands did not remain suitable barred owl habitat on at least a seasonal basis. *ZRB, LLC v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 6180-04, 2007 N.J. AGEN LEXIS 921, Final Decision (July 2, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 78) adopted, which concluded that order to remove driveway and penalty were proper where landowners stipulated that they violated the Freshwater Wetlands Protection Act by constructing the driveway in wetlands without obtaining a permit from the Department and the owners failed to establish any basis to excuse their failure to seek a permit; in addition, the ALJ found that the Department's expert testimony on bald eagle habitat was more reliable than that of the landowner's expert and thus that the wetlands were properly determined to be of "exceptional" resource value. *N.J. Dep't of Env'tl. Prot. v. Shinn*, OAL Dkt. No. ESA 02964-02S, 2006 N.J. AGEN LEXIS 578, Final Decision (April 3, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 621) adopted, which concluded that 1974 land use approval received from the municipal planning board did not exempt the subject property from the transition area buffer requirement applicable to property of exceptional resource value; the Municipal Planning Act under which the approval was given did not apply since it was prior to adoption of the 1975 Municipal Land Use Law. *Masset v. N.J. Dep't of Env'tl. Prot./Land Use Regulation Program*, OAL Dkt. No. ESA 11951-04, 2005 N.J. AGEN LEXIS 1301, Final Decision (December 5, 2005).

Wetland was suitable habitat for endangered species even though none had been sighted on wetland; exceptional resource value. *Rossi v. Division of Coastal Resources*, 92 N.J.A.R.2d (EPE) 244.

Intermittent stream; man-made alterations; not "ditch" ranked as ordinary value wetlands. *Classic Custom Homes v. Land Use Regulation Program*, 92 N.J.A.R.2d (EPE) 230.

7:7A-2.5 General transition area provisions

(a) A transition area serves as:

1. An ecological transition zone from uplands to freshwater wetlands which is an integral portion of the freshwater wetlands ecosystem, providing temporary refuge for freshwater wetlands fauna during high water episodes, critical

habitat for animals dependent upon but not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects; and

2. A sediment and storm water control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetlands species.

(b) Acts or acts of omission in a transition area that adversely affect a transition area's ability to serve as any of the areas described below at (b)1 to 7 shall be deemed inconsistent with (a) above:

1. A temporary refuge for freshwater wetlands fauna during high water episodes;

2. A habitat area for activities such as breeding, spawning, nesting and wintering for migrating, endangered, commercially and recreationally important wildlife;

3. An area to accommodate slight variations in freshwater wetland boundaries over time due to hydrologic or climatologic effects;

4. A remediation and filtration area to remove and store nutrients, sediments, petrochemicals, pesticides, debris and other pollutants as they move from the upland towards the freshwater wetlands;

5. A buffer area to keep human activities at a distance from freshwater wetlands, thus reducing the impact of noise, traffic, and other direct and indirect human impacts on freshwater wetlands species;

6. A corridor area which facilitates the movement of wildlife to and from freshwater wetlands and from and to uplands, streams and other waterways; and

7. A sediment and storm water control area to reduce the adverse effects of development or disturbance upon freshwater wetlands, flora and fauna, and nearby waterways.

(c) A transition area is required adjacent to a freshwater wetland of exceptional resource value and of intermediate resource value as classified in N.J.A.C. 7:7A-2.4. A transition area is not required adjacent to a freshwater wetland of ordinary resource value or adjacent to a State open water.

(d) The standard width of a transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet. This standard width shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-6.1(a).

(e) The standard width of a transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet. This standard width shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-6.1(a).

(f) A person shall not engage in regulated activities, as described at N.J.A.C. 7:7A-2.6, in a transition area except pursuant to a transition area waiver.

(g) A transition area shall be measured outward from a freshwater wetland boundary line on a horizontal scale perpendicular to the freshwater wetlands boundary line as shown

in Figure 1 below. The outside boundary line of a transition area shall parallel, that is, be equidistant from, the freshwater wetlands boundary line, unless the Department issues a transition area waiver. The width of the transition area shall be measured as the minimum distance between the freshwater wetlands boundary and the outside transition area boundary.